DEPARTMENT OF STATE REVENUE

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Letter of Findings Number: 09-0459
Sales Tax
For the Years 2005-2007

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ISSUES

I. Sales and Use Tax–Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-7; IC § 6-2.5-5-15 (repealed July 1, 2004); IC § 6-2.5-5-15.5; IC § 6-8.1-5-1; 45 IAC 2.2-3-27; 45 IAC 2.2-4-27; Commissioner's Directive 25 (July 2004).

Taxpayer protests the imposition of sales and use taxes.

II. Tax Administration–Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a corporation doing business in Indiana. The Indiana Department of Revenue ("Department") audited Taxpayer for sales and use taxes for the years 2005, 2006, and 2007. The Department determined that Taxpayer had failed to collect sales tax on certain sales of recreational vehicles to out-of-state purchasers for the tax years at issue. Also, the Department determined that Taxpayer had not paid sales tax on certain purchases of items consumed in its business. The Department therefore issued proposed liabilities for sales tax and use tax, ten percent negligence penalties, and interest. Taxpayer protests the imposition of sales tax on the sales of recreational vehicles, and on a portion of the use tax impositions. Taxpayer also protests the imposition of penalties. The Department conducted an administrative hearing and this Letter of Findings results. Further facts will be supplied as required.

I. Sales and Use Tax–Imposition.

Taxpayer protests the imposition of sales and use taxes for the years 2005-07. Taxpayer states that it met all requirements in the course of selling the recreational vehicles and collected and remitted all sales tax which was due. Taxpayer also states that the Department imposed use tax on items which were not subject to sales tax and that no use tax is due on those items. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The sales tax is imposed by IC § 6-2.5-2-1, which states:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state. (Emphasis added.)

Next, IC § 6-2.5-3-7 states:

(a) A person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana. However, the person or the retail merchant can produce evidence to rebut that presumption.

(b) A retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax.

(c) A retail merchant that sells tangible personal property to a person that purchases the tangible personal property for use or consumption in providing public transportation under IC 6-2.5-5-27 may verify the exemption by obtaining the person's:

(1) name;

(2) address; and

(3) motor carrier number, United States Department of Transportation number, or any other identifying number authorized by the department.

The person engaged in public transportation shall provide a signature to affirm under penalties of perjury that the information provided to the retail merchant is correct and that the tangible personal property is being purchased for an exempt purpose.

(Emphasis added).

Prior to July 1, 2004, Indiana had an exemption for the sale of motor vehicles which were to be immediately transported to a destination outside of Indiana. The statute providing this exemption, IC § 6-2.5-5-15, was repealed as of July 1, 2004. Also on July 1, 2004, sales tax exemption certificate ST-137 was eliminated and was

no longer an effective document for claiming an exemption from sales tax for out-of-state purchasers of motor vehicles to be titled or registered outside of Indiana, as explained by Commissioner's Directive 25 (July 2004). Commissioner's Directive 25 (2004) also explains in relevant part:

> The repeal of IC 6-2.5-5-15 only affects situations where the purchaser takes possession of the vehicle prior to taking the vehicle out of state.
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> This repeal does not affect out of state sales by Indiana dealers. For a sale of a vehicle to be considered out of state, the purchaser must take possession via delivery outside of Indiana. No exemption certificate is required when making an out of state sale. However, the sales contract must specify that the vehicle is to be delivered out of state and the dealer must maintain shipping documentation to verify that the vehicle was delivered to the purchaser at a specific out of state location.
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> (Emphasis added.)

Taxpayer protests that it did maintain shipping documentation which verified that the vehicles were delivered to the purchasers at specific out-of-state locations. In the course of the protest process, Taxpayer provided documentation which established that the vehicles were in fact delivered at a specific out-of-state address. Therefore, Taxpayer has provided documentation establishing that it met the requirements provided in Commissioner's Directive 25 (July 2004), and has therefore met its burden under IC § 6-8.1-5-1(c).

Also, one vehicle was included as a taxable Indiana sale. The title of the vehicle in question was transferred from a husband's name to a wife's name as part of divorce proceedings. The Department considered this to be a transaction and that Taxpayer should have collected sales tax on that transaction. Taxpayer has provided a copy of an exemption certificate which explains that the transaction resulted in the deletion of the wife from the title to the vehicle. IC § 6-2.5-5-15.5 explains:

> A transaction involving a motor vehicle is exempt from the state gross retail tax, if:
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> (1) the transaction consists of changing the motor vehicle title to add or delete an individual; and
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> (2) the individual being added or deleted is the spouse, child, grandparent, parent, or sibling of an owner.

Therefore, since the transaction deleted the wife from the title to the vehicle, prior to the finalization of their divorce, the transfer was exempt under IC § 6-2.5-5-15.5.

Next, Taxpayer protests that the Department included items used in lawn services in the category of capital assets. The Department imposed use tax on these items under 45 IAC 2.2-3-27, which provides:

> The person who stores, uses or consumes tangible personal property in Indiana may avoid paying the use tax to the Department if such person retains for inspection by the Indiana Department of Revenue a receipt evidencing payment of the tax.

Taxpayer states that it paid sales tax on the contract for the lawn service and it did retain a receipt for the transaction in question. The Department reviewed the invoice and found that sales tax had not been paid. Therefore, use tax was assessed. The invoice included charges for the use of a skid loader and a roller, which the Department referred to as capital assets. The relevant regulation is 45 IAC 2.2-4-27, which states:

> (a) In general, the gross receipts from renting or leasing tangible personal property are taxable. This regulation [45 IAC 2.2] only exempts from tax those transactions which would have been exempt in an equivalent sales transaction.
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> (b) Every person engaged in the business of the rental or leasing of tangible personal property, other than a public utility, shall be deemed to be a retail merchant in respect thereto and such rental or leasing transaction shall constitute a retail transaction subject to the state gross retail tax on the amount of the actual receipts from such rental or leasing.
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> (c) In general, the gross receipts from renting or leasing tangible personal property are subject to tax. The rental or leasing of tangible personal property constitutes a retail transaction, and every lessor is a retail merchant with respect to such transactions. The lessor must collect and remit the gross retail tax or use tax on the amount of actual receipts as agent for the state of Indiana. The tax is borne by the lessee, except when the lessee is otherwise exempt from taxation.
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> (d) The rental or leasing of tangible personal property, by whatever means effected and irrespective of the terms employed by the parties to describe such transaction, is taxable.
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> (1) Amount of actual receipts. The amount of actual receipts means the gross receipts from the rental or leasing of tangible personal property without any deduction whatever for expenses or costs incidental to the conduct of the business. The gross receipts include any consideration received from the exercise of an option contained in the rental of lease agreement; royalties paid, or agreed to be paid, either on a lump sum or other production basis, for use of tangible personal property; and any receipts held by the lessor which may at the time of their receipt or some future time be applied by the lessor as rentals.
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> (2) Rental or lease period. For purposes of the imposition of the gross retail tax or use tax on rental or leasing transactions, each period for which a rental is payable shall be considered a complete transaction. In the case of a weekly rate, each week shall be considered a complete transaction. In the case of a continuing lease or contract, with or without a definite expiration date, where rental payments are to be made monthly or on some other periodic basis, each payment period shall be considered a completed transaction.

(3) Renting or leasing property with an operator:

(A) The renting or leasing of tangible personal property, together with the services of an operator shall be subject to the tax when control of the property is exercised by the lessee. Control is exercised when the lessee has exclusive use of the property, and the lessee has the right to direct the manner of the use of the property. If these conditions are present, control is deemed to be exercised even though it is not actually exercised.

(B) The rental of tangible personal property together with an operator as part of a contract to perform a specific job in a manner to be determined by the owner of the property or the operator shall be considered the performance of a service rather than a rental or lease provided the lessee cannot exercise control over such property and operator.

(C) When tangible personal property is rented or leased together with the service of an operator, the gross retail tax or use tax is imposed on the property rentals. The tax is not imposed upon the charges for the operator's services, provided such charges are separately stated on the invoice rendered by the lessor to the lessee.

(D) Notwithstanding any other provision of this regulation [45 IAC 2.2] any lessee leasing or renting a vehicle(s) from any lessor, including an individual lessor, with or without operators, driver(s), or even if the operator (driver) himself is the lessor, regardless of control exercised, shall not be subject to the gross retail tax or use tax, if the leased or rented vehicle(s) are directly used in the rendering of public transportation.

(4) Supplies furnished with leased property. A person engaged in the business of renting or leasing tangible personal property is considered the consumer of supplies, fuels, and other consumables which are furnished with the property which is rented or leased.

(Emphasis added).

Taxpayer has provided documentation to establish that it did not own the skid loader or roller, but that those items were used by the lawn service in providing the service. Since Taxpayer exercised no control over the use of the skid loader or roller, those items are not taxable under 45 IAC 2.2-4-27. However, since the invoice does not show sales tax on any items, use tax remains due on the seeds, topsoil, and limestone which were supplied in the provision of the lawn care services.

The next items which Taxpayer protests are a fuse and battery listed on page sixteen (16) and a down payment on a forklift listed on page seventeen (17) of the audit report. Taxpayer states that the fuse and battery are items for resale and are therefore not subject to sales tax. Also, Taxpayer states that the down payment is not subject to sales tax, since sales tax was charged on the final invoice for the full amount of the forklift. A review of the documentation supplied in the course of the protest process confirms that these items are not subject to sales or use tax.

The next item which Taxpayer protests is listed on page nineteen (19) of the audit report and is referred to as "Account 164." Taxpayer states that this is not a current year purchase account, but rather is a cumulative purchase balance sheet account, reflecting the purchase of a computer for which no receipt showing sales tax paid was provided, which results in a distortion of the percentage of error calculated on page eighteen (18) of the audit report. Taxpayer believes that this account should be removed and the percentage of error recalculated. The recalculated percentage should then be applied to the amount of purchases as described on page five (5) of the audit report. A review of the documentation supplied does not confirm that Account 164 is a balance sheet account. While the amount originally included in Account 164 has been reduced by the auditor in a prior adjustment, Taxpayer has not established that the remaining amount should be removed, or that the error percentage should be recalculated as a result.

In conclusion, Taxpayer is sustained on its protest of the imposition of sales tax on recreational vehicles which were delivered to a specific address in another state. Taxpayer is sustained on its protest of the imposition of sales tax on the transaction between the husband and wife. Taxpayer is partially sustained on its protest of the imposition of use tax on the lawn care services. Use tax is not due on the skid loader and roller. Use tax remains due on the seed, topsoil, and limestone. Taxpayer is sustained on its protest of the imposition of use tax on the fuse, battery, and down payment on the forklift. Taxpayer is denied on its protest of the inclusion of Account 164 in the error percentage calculations. The Department will conduct a supplemental audit to reflect these findings.

FINDING

Taxpayer's protest is sustained in part and denied in part, as described above.

II. Tax Administration–Negligence Penalty.

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty. The Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

. . .

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

. . .

the person is subject to a penalty.

The Department refers to 45 IAC 15-11-2(b), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) provides in pertinent part:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, Taxpayer incurred a deficiency which the Department determined was due to negligence under 45 IAC 15-11-2(b), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). While Taxpayer was partially sustained on its protest in Issue I, some use tax liabilities remain. Taxpayer has not affirmatively established that its failure to pay the remaining deficiency was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c). The amount of penalty will be recalculated after making the adjustments resulting from the outcome of Taxpayer's protest in Issue I.

FINDING

Taxpayer's protest is denied.

CONCLUSION

Taxpayer's protest is partially sustained on Issue I regarding imposition of sales and use tax, as described in Issue I. Taxpayer's protest is denied on Issue II regarding imposition of negligence penalties.

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